United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT HENRY DANIELS, JR.

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,324

HENRY DANIELS, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

August 16, 1965

STATEMENT OF QUESTIONS PRESENTED

In a narcotics case in which important testimony is given by an employee of the Internal Revenue Service, should a new trial be granted where the defendant was deprived of the opportunity to question and/or challenge an employee of the Treasury Department on the jury by reason of her failure to admit such employment when examined on voir dire?

Should the indictment have been dismissed because of the government's purposeful delay of two months between the time of the narcotics violations charged and arrest, where the delay resulted in appellant's being deprived of an opportunity to prove an alibi?

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*/ Cases or authorities chiefly relied upon are marked by asterisks.

STATUTES AND RULES INVOLVED

21 USC § 174 - Importation of narcotic drugs prohibited; penalty; evidence.

> Whoever fraudently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. (Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§ 1, 5 (1), 65 Stat. 767; July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

26 USC § 4704(a) - Packages; general requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. (Aug. 16, 1954, ch. 736, 68A Stat. 550.)

26 USC § 4705(a) - Order forms; general requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. (Aug. 16, 1954, ch. 736, 68A Stat. 551.)

Federal Rule of Criminal Procedure 24, USC, Tit. 18, App. - Trial Jurors.

(a) Examination.

The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges.

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the

offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

* * *

STATEMENT OF POINTS

1. The concealment by a juror on voir dire examination of the fact of her employment by the Treasury Department deprived appellant of due process and nullified his rights under Criminal Rule 24. The trial court erred in denying appellant's motion for a new trial based on this point.

2. The trial court erred in denying appellant's motion to dismiss based on the government's purposeful delay in arresting appellant.

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,324

HENRY DANIELS, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellant was tried in the United States District Court for the District of Columbia on an indictment charging him and one Edward G. Hazel, Jr., with violation of 26 USC §§ 4705(a) and 4704(a) and 21 USC § 174. The jury returned a verdict of guilty on all three counts, and appellant was sentenced to serve, concurrently, five years on Count I, twenty to sixty months on Count II, and five years on Count III. After denying appellant's motion for a new trial, Judge Keech granted leave to appeal in forma pauperis.

This court has jurisdiction under 28 USC § 1291.

STATEMENT OF THE CASE

On the evening of July 6, 1964, Pvt. Brooks, a member of the M.P.D. narcotics squad, apparently purchased narcotics in the vicinity of 14th and U Streets, N.W. There Brooks, accompanied by one Ernest Tomlinson, a police informer, gave eight dollars to one Edward G. Hazel, Jr. (Tr. 6, 45, 58, 88.) Hazel walked down the street, met a fourth man identified as the defendant, and returned to the company of Brooks and Tomlinson. (Tr. 7, 46.) The trio walked up 14th Street to an intersection, where Hazel gave Brooks four gelatin capsules containing a white powder and 50 cents. (Tr. 9, 46-47, 63.) Although the meeting between Hazel and the man identified as the defendant took place on a crowded sidewalk at a distance of approximately 35 feet from Brooks and Tomlinson, Brooks testified that the capsules were given to Hazel by the

defendant and were dispensed from an unstamped package. (Tr. 8-9, 28, 37-39; cf. 50-55.) Brooks further testified that he gave neither Hazel nor Daniels a written order for the capsules. (Tr. 9, 40.)

At trial the prosecution's two witnesses to the transaction, Brooks and Tomlinson, gave somewhat varying accounts of the circumstances surrounding the alleged sale. For example, testimony on the question of whether or not Hazel*/ had had an opportunity to switch capsules was in conflict. Brooks testified that after the transaction, as the trio walked up 14th Street, Hazel was on Brooks' right side, next to the gutter, and that Brooks could keep Hazel's right hand (supposedly containing the capsules) in view at all times. (Tr. 8, 32-34.) In direct contradiction, Tomlinson testified that most of the distance he (Tomlinson) was between Brooks and Hazel and that it was Brooks who was on the gutter side. (Tr. 61-62.) Nor could the prosecution's witnesses agree on whether at the time of the alleged transaction they stood in front of No. 1914 1/2 and Hazel and appellant stood in front of No. 1918, or vice versa. (Cf. Tr. 21-23, 34-35 with 49, 51.)

Brooks turned the white capsules over to Pvt. Hankins, M.P.D. narcotics squad, who subsequently turned them over to John A. Steele, a chemist with the Alcohol and Tobacco Tax Laboratory, Internal Revenue Service, Department of the Treasury.

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*/ Hazel was a fugitive at the time of trial. (Tr. 24, 32.)

(Tr. 67, 71.) Steele testified that the capsules contained heroin hydrochloride. (Tr. 74.) Detective Somerville, M.P.D. narcotics squad, testified to the arrest on warrant of the appellant on September 11, 1964, at the scene of the alleged transaction. (Tr. 68-69, 85.)

Upon denial of appellant's motion for judgment of acquittal (Tr. 76-77), he took the stand. He denied having seen Brooks prior to the preliminary hearing, he denied any narcotics transaction with Hazel or Brooks, and he testified that he was unable to recall the events of July 6, 1964, because of the passage of time between July 6, 1964, and September 11, 1964. (Tr. 78-81, 83, 86, 89-90.)

Before trial appellant had filed a written motion to dismiss the indictment because of the prejudice arising from the lapse of time between the date of the acts charged and the date of arrest and preliminary hearing. This motion was denied without prejudice by Chief Judge McGuire in motions session, and was renewed orally before Judge Keech. (Supp. Tr. 2-4.) Although Judge Keech did not explicitly rule on the motion at the close of defendant's evidence, the motion must be taken as denied by implication.

In the course of examination of the jury panel on voir dire, defense counsel asked this question: Are any of you or do you have close relatives who are connected with the Treasury Department or the Internal Revenue Service? There

was no response. (Supp. Tr. 4.) In fact, juror number three, Mrs. Louise H. Mickens, was employed by the Treasury Department, as defense counsel discovered after trial.*/ Defendant's motion for a new trial on this ground was denied by Judge Keech.

This appeal followed.

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*/ That Mrs. Mickens was employed by the Treasury Department does not appear in the record, although the government's opposition to appellant's motion for a new trial concedes the fact by implication. If necessary, the court is asked to take judicial notice of the juror's questionnaire in the files of the Jury Commission. See 26 F.R.D. 474. Cf. Shafer v. Children's Hosp. Soc. of L.A., 105 U.S.App.D.C. 123, 126, 265 F.2d 107, 110 (1959).

SUMMARY OF THE ARGUMENT

Appellant has been deprived of the right to challenge jurors for cause and peremptorily. A juror's wrongful failure to reveal on voir dire examination that she was employed by the Treasury Department, which is charged with enforcement of the narcotics laws and which employed one of the witnesses, effectively nullified appellant's right to challenge her. A denial of appellant's statutory and Constitutional rights resulted. Where a juror is accepted through her own wrong, the jury is thereby unlawfully constituted, and appellant is entitled to a new trial without the necessity of showing that her possible bias caused an unjust verdict.

The indictment should have been dismissed because of the government's purposeful delay in arresting appellant. The two-month delay between the alleged sale of narcotics and the arrest of appellant was unnecessary and solely for the convenience of the government. Because of the delay, appellant was unable to recall his whereabouts on the date of the alleged sale, thereby effectively depriving him of the defense of alibi.

ARGUMENT

I. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY WHICH CONVICTED HIM WAS NOT LAWFULLY SELECTED

[With respect to point I, appellant desires the court to read the following pages of the reporter's transcript: Tr. 71-72, Supp.Tr. 4.]

A. Appellant Was Deprived of an Essential Element of a Fair Trial

Appellant was deprived of one of the basic protections accorded an accused under our system of trial "by an impartial jury"[1/] -- the right to challenge jurors for cause and peremptorily. The right of challenge is an integral part of trial by jury and "has always been held essential to the fairness of trial by jury." Lewis v. U.S., 146 U.S. 370, 376 (1892). And see Pointer v. U.S., 151 U.S. 396, 408-09 (1894).

Exercise of this right is based on a fair opportunity to examine the panel on voir dire. Pointer v. U.S., supra. Improper restriction of this right of examination is reversible error. See, e.g., Morford v. U.S., 339 U.S. 258 (1950) (per curiam); Brown v. U.S., 119 U.S.App.D.C. ---, 338 F.2d 543 (1964). The purpose of examination is to obtain information. Thus, to accomplish the purpose of examination on voir dire it is necessary that the jurors answer fully and truthfully. As this court has stated:

> [I]t is the duty of every juror to answer questions affecting his qualifications honestly, and if he

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1/ U.S. Const. amend. VI.

> conceals a material fact which, if disclosed, would probably have induced counsel to strike him from the jury, a new trial should ordinarily be ordered.

Carpenter v. U.S., 69 App.D.C. 306, 307, 100 F.2d 716, 717 (1938). See also, U.S. v. Lampkin, 66 F.Supp. 821, 824 (S.D. Fla. 1946).

In the instant case one juror, by failing to answer the question asked by appellant's trial counsel, "Are any of you or do you have close relatives who are connected with the Treasury Department or the Internal Revenue Service?", thereby vitiated the examination. This was a simple question, calling for information which must have been within her knowledge and consciousness, yet she failed to respond. What motivated her to remain silent the record does not show. Yet, whether or not she is guilty of contempt,2/ the appellant was effectively prevented from inquiring further into the extent of her bias or from challenging her peremptorily. Cf. Dennis v. U.S., 339 U.S. 162, 172 (1950); Pointer v. U.S., 151 U.S. 396, 408-09 (1894).

B. Appellant Was Denied the Opportunity to Show Possible Bias.

The juror's silence denied appellant the opportunity to inquire into her possible bias. Had appellant's counsel known of her employment by the Treasury Department, he likely would have inquired as to her relationship to and attitude

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2/ Cf. Clark v. U.S., 289 U.S. 1, 10 (1933).

toward the Bureau of Narcotics and the Alcohol and Tobacco Tax Division, where the witness Steele was employed as a chemist. As to government employees in general on the panel, "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. U.S., 339 U.S. 162, 171-72 (1950); cf. Connors v. U.S., 158 U.S. 408, 413 (1895). As to a servant of the Secretary of the Treasury, charged with enforcing the statute and employing one of the witnesses for the prosecution, the propriety and necessity for such inquiry is obvious.

When the Supreme Court upheld the act[3] removing the absolute disqualification of government employees as jurors in criminal cases, Wood v. U.S., 299 U.S. 123 (1936), it recognized the relevance of such employment and the special case with which the interest arising out of that relationship should be probed:

> In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him. [4]

Here appellant's counsel could inquire into none of these factors, for he was turned away at the threshold by the juror's wrongful reply.

3/ Act of Aug. 22, 1935, c. 605, 49 Stat. 682; now D.C. Code § 11-2302 (Supp. IV).

4/ U.S. v. Wood, supra, at 134.

C. Appellant Was Denied the Right to Exercise a Peremptory Challenge

The juror, by denying appellant's counsel this relevant information, substantially impaired appellant's constitutional right to a fair and impartial jury. The peremptory challenge is a recognized element in the process of selecting such a jury. Both the importance of the peremptory challenge itself and the essential condition of its exercise were recognized by the Supreme Court in Pointer v. U.S., 151 U.S. 396 (1894), where the Court said:

> The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused. ... [H]e cannot be compelled to make a peremptory challenge until ... an opportunity [has been] given for ... examination of [each proposed juror] ...

Id., 151 U.S. at 408-09; cf. Smith v. U.S., 262 F.2d 50 (4th Cir. 1958); Lewis v. U.S., 146 U.S. 370 (1892).

Where a juror conceals a material fact, that most important right of peremptory challenge is nullified. The Tenth Circuit in the recent case of Photostat Corp. v. Ball, 338 F.2d 783 (1964), recognized the prejudicial effect of such silence. There jurors in a negligence case improperly failed to respond when the jury was asked if any member had ever filed an auto claim. This failure was not intentional, and the information sought would not have compelled their exclusion from the jury. But the court granted a new trial, quoting from an earlier

decision:

> [W]hether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect of his competency. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right.

Id., 338 F.2d at 787. The Photostat case is one of the many civil cases deriving from the leading case of Shulinsky v. Boston & M. R.R., 83 N.H. 86, 139 A. 189 (1927), where a juror concealed the fact that he had co-signed some notes for the plaintiff in a negligence action. Although this circumstance was not a basis for disqualification by statute or in fact, the court reversed because the statutory right of challenge had been impaired. The court said:

> When the information is furnished under the court's authority, the right of challenge includes the incidental right in its protection that the information shall be true. ... [I]f by reason of false information furnished under the court's authority and in organizing the jury, a peremptory challenge as to a prospective juror is not exercised, the party having the right of challenge is as effectively deprived of his right as though the right were denied. The right to challenge implies its fair exercise, and if a party is misled by erroneous information obtained through application to the court, the right of rejection is impaired. False information thus obtained and relied on is as destructive of a fairly constituted jury in its application to a peremptory challenge as to a challenge for cause.
>
> * * *
>
> Nor is there any force in argument that the information though false was unintentionally so, and that there was therefore no bad faith. The harm lies in the falsity of the information.... While willful falsehood may intensify the wrong

> done, it is not essential to constitute the wrong.

Id., 139 A. at 190-91. See also, Marvins Credit, Inc. v. Steward, 133 A.2d 473 (Mun.Ct.App.D.C. 1957); Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 88 A.L.R. 917 (1933)("[T]he right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true."). Surely the courts will not be more tender toward the impartiality of civil juries than of criminal juries.

Rule 24 of the Federal Rules of Criminal Procedure preserves to the accused his right of peremptory challenge and provides for its meaningful exercise through the voir dire examination. As to this appellant the right of peremptory challenge was nullified as completely as though the court had wrongfully denied such right. Cf. Photostat Corp. v. Ball, supra.

D. The Jury Was Not Lawfully Constituted.

The effect of the juror's incorrect response on voir dire was to make her a juror in name only. Appellant was entitled to be tried by a properly constituted court. This right was denied, where one of the jurors found her way onto the jury through her own wrong.

Of the effect of a juror's improper silence in response to a question as to whether any prospective juror was

or had been involved in a personal injury suit, the Tenth Circuit said:

> Since he was not a competent juror, the jury with his membership thereon was not a properly constituted tribunal. ... True, the verdict was unanimous but that did not immunize it from attack upon the ground that the particular juror was not competent. The integrity of the verdict depended on there being twelve competent jurors, not eleven.

Consolidated Gas Co. v. Carver, 257 F.2d 111, 116 (1958). Cf. Clark v. U.S., 289 U.S. 1, 10-11 (1933); Shulinsky v. Boston & M. R.R., supra. Not having been tried by a jury selected in the manner and under the protections prescribed by law, appellant is entitled to a new trial.

E. Appellant Is Entitled to a New Trial Without a Showing of Prejudice

Appellant need not show by affidavit or otherwise that the juror was biased in fact. The rule has been stated thusly:

> When a prospective juror, on voir dire examination, gives a false or deceptive answer to a question pertaining to his qualifications with the result that counsel is deprived of further opportunity to determine whether the juror is impartial, and the juror is accepted, a party deceived thereby is entitled to a new trial even if the juror's possible prejudice is not shown to have caused an unjust verdict.

Kerby v. Hiesterman, 162 Kans. 490, 178 P.2d 194, 195 (1947) (syllabus by the court). The reason is simple. The juror must either have had some cause to practice deception, or else had little regard, to say the least, for an oath. Neace v. Commonwealth, 313 Ky. 225, 230 S.W.2d 915, 917 (1950); and see People v. De Haven, 321 Mich. 327, 32 N.W.2d 468 (1948), cited

therein. In either event appellant was not tried by a qualified jury, for one juror's oath to well and truly try the case cannot be relied upon.

II. THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE OF THE GOVERNMENT'S PURPOSEFUL DELAY IN ARRESTING APPELLANT.

[With respect to point II, appellant desires the court to read the following pages of the reporter's transcript: Tr. 80, 89-90, as quoted below, and Supp.Tr. 2-4.]

A. Appellant Was Prejudiced by the Delay.

The record at trial graphically demonstrates the prejudice suffered by appellant by reason of the Government's delay in arresting him. The transcript records the total inability of appellant to recall his whereabouts on the date of the alleged sale to Hazel:

BY MR. TRACY: * * *

Q Mr. Daniels, do you recall what you did on July 6, 1964?

A No, I don't.

Q Can you state a reason as to why you don't recall?

THE COURT: He said he doesn't recall, sir.

BY MR. TRACY:

Q Have you tried to recall?

A I tried to recall, yes, but I haven't. [Tr. 80.]

* * *

BY MR. CAPUTY:

Q Now, it is your testimony that you don't know where you were on July 6, 1964, isn't that what you are saying?

A No, I can't state where I was on July 6, 1964.

Q Now, you are not saying that you were not in the 1900 block of 14th Street, Northwest, July 6, are you?

A No, I am not saying that I was not there.

Q You can't remember a thing about July 6, 1964? Right?

A I am trying to say that I don't remember no incident that occurred where I should remember what happened on July 6, 1964. [Tr. 89-90.] 5/

Despite appellant's inarticulateness, it is painfully clear that not only could appellant himself not testify that he was somewhere else at 8 o'clock on July 6, 1964, but he was additionally precluded from identifying others who could testify that he was in their presence elsewhere at the time of the alleged sale. Nor could he assist his appointed counsel in reconstructing his activities on July 6, 1964. As this court expressly recognized in Cannady v. U.S., No. 18,392, decided July 14, 1965, "the delay between an alleged offense and the arrest of an accused, when he is first informed of the accusations, may so blur his memory that were he innocent he might be unable to recall the facts which would comprise his alibi or other defense." (Slip op., p. 2.) In this case the indirectness and inconsistencies in the government's evidence make it not improbable that an alibi defense could have succeeded. The government's delaying

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5/ Cf. Hanrahan v. U.S., No. 18,038, decided June 24, 1965, slip op., pp. 4, 8, 11.

tactics totally deprived appellant of the ability to offer this defense.6/

B. The Delay Was Proscribed by the Fifth Amendment.

The delay was purposeful, and neither in opposition to appellant's motion to dismiss, filed January 27, 1965, nor at trial does the record show that the government came forward with any circumstances justifying the delay. The government's case was completed with the chemical analysis, yet it chose to delay for its own purposes. This court, of course, has already taken note of the modus operandi of the narcotics squad in Ross v. U.S., No. 17,877, decided June 30, 1965. And see Chief Judge Bazelon's dissent in Wilson v. U.S., 118 U.S.App.D.C. 319, 321, 335 F.2d 982, 984 (1964)(on petition for rehearing in banc). There, as here, the delay was for the convenience of the police. That the delay was not seven months, as in Ross, is no more determinative of the legal issue here than was the fact that in Ross the seven months delay was less than the period of the statute of limitations. The Fifth Amendment draws no clear, bright line in terms of days or months, but the court's action in remanding the case to the district court in Mackey v. U.S., No. 18,525, is authority for the proposition that a two-month delay falls within the protection of that Amendment.7/

6/ Appellant was further disadvantaged in that his lack of knowledge of the impending prosecution prevented his moving for a speedy trial. Cf. Taylor v. U.S., 99 U.S.App.D.C. 183, 185-86, 238 F.2d 259, 261-62 (1956); Miller v. Overholser, 92 U.S.App. D.C. 110, 114, 206 F.2d 415, 419 (1953).

7/ Appellant's testimony quoted above supplies the element of prejudice which the court found missing in Mackey, supra.

C. The Conviction Was Thereby Vitiated.

The delay having been "purposeful," in that it was "caused by the deliberate act of the government", Pollard v. U.S., 352 U.S. 354, 361-62 (1957), and prejudice to the appellant having been shown, the appellant's pre-trial motion to dismiss the indictment, renewed at trial, should have been granted. Cf. Ross v. U.S., supra.

CONCLUSION

For the foregoing reasons appellant submits that his conviction must be reversed. Should this court rule in his favor only on the basis of the abortive voir dire, the case should be remanded for a new trial. Should this court rule in his favor on the basis of the government's delay in arresting him, the indictment must be dismissed.

Respectfully submitted,

William Malone
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Attorney for the Appellant
(Appointed by this Court)

August 16, 1965

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,324

HENRY DANIELS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
HENRY J. MONAHAN,
Assistant United States Attorneys.

Cr. No. 1022-64

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Prior to empanelling the jury, all parties were furnished with a list showing the occupation of each venireman. One woman was listed as a check numberer in the Treasury Department. On *voir dire* neither she nor anyone else responded to a question with reference to connection with that Department. She was seated as a juror without objection. After adverse verdict, counsel filed a motion for new trial claiming that the juror was disqualified. The question is whether in these circumstances the trial judge correctly denied the motion.

2) Whether the District Court abused its discretion in denying appellant's motions to dismiss the indictment where:

(a) a legitimate reason existed for the delay of two months and three days from the occurrence of the offense to the issuance of the arrest warrant;

(b) the undercover officer's testimony was corroborated by an eyewitness' testimony; and

(c) appellant's assertion that he could not recall the events of July 6, 1964, was controverted by his recollection of a circumstance surrounding the offense, *i.e.*, the informer's presence?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed on November 16, 1964, appellant and a co-defendant [1] were charged with the sale and possession of narcotics. On January 27, 1965, appellant filed a written motion to dismiss the indictment on the ground, *inter alia*, that the two-month delay between the offense and his arrest violated his Fifth Amendment right to due process. On February 2, 1965, appellant's motion was heard and denied by Chief Judge McGuire without prejudice.[2] On March 8, 1965, appellant orally moved to dis-

[1] Edward G. Hazel, Jr., who was a fugitive at time of trial (Tr. 24).

[2] The transcript of the hearing is not part of the record on appeal.

miss the indictment before Chief Judge McGuire, who again denied it without prejudice (E. 3).[2] On being assigned to Judge Keech for trial, appellant again orally moved to dismiss the indictment (E. 2), but thereafter withdrew his motion (E. 4).[4] Appellant was found guilty by a jury. On March 11, 1965, appellant filed a motion for a new trial, and on March 26, 1965, his motion was heard and denied by Judge Keech.[5] On April 9, 1965, appellant was sentenced to concurrent prison terms of five years; twenty to sixty months; and five years. An appeal at public expense was authorized by the District Court.

Voir Dire

In the course of his *voir dire* examination, appellant's trial counsel asked the following question:

> Are any of you or do you have close relatives who are connected with the Treasury Department or the Internal Revenue Service?

There was no response to this question (E. 4).

Trial

Officer Carl W. Brooks testified that he had been a member of the Narcotics Squad of the Baltimore City Police Department and that he had joined the Metropolitan Police Department on February 3, 1964. Two weeks later he was assigned to the Narcotics Squad and began working in an undercover capacity (Tr. 3-4). During his covert operations he had occasion to see appellant and knew him by the nickname of Danny (Tr. 4, 23).

About 8 p.m. on July 6, 1964, Brooks and his companion, Ernest Tomlinson, chanced upon Edward G. Hazel,

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[2] "E." refers to the excerpt of the pre-trial proceedings on March 8, 1965, before Judge Keech. "Tr." refers to the trial proceedings also before Judge Keech.

[4] Appellant erroneously asserts at page 4 of his brief that the motion was denied by implication.

[5] The hearing of March 26 has not been transcribed.

Jr., on the southwest corner of 14th and U Streets, N.W. After a brief conversation with Brooks, Hazel walked north on 14th Street but returned to Brooks and Tomlinson ten minutes later. As a result of another conversation between Brooks and Hazel, all three began walking south in the 1900 block of 14th Street, N.W. (Tr. 5-6). In front of 1930 14th Street, N.W., Brooks gave Hazel $8.00 in Metropolitan Police funds. As a result of a further conversation with Hazel, Brooks and Tomlinson stopped in front of 1918 14th Street, N.W., while Hazel walked up to appellant in front of a store at 1914½ 14th Street, N.W. (Tr. 6-7, 21). Since it was still light and there was then no pedestrian traffic, Brooks had an unobstructed view of Hazel and appellant from his vantage point in the middle of the sidewalk (Tr. 22, 29, 35). Brooks saw Hazel give appellant a sum of money. In turn, appellant produced a small brown manila envelope and poured the capsules into his own hand. Appellant then transferred them from his own hand to Hazel's right hand (Tr. 8, 29). Hazel rejoined Brooks and Tomlinson and all three retraced their steps to the southwest corner of 14th and U Streets, N.W. As Brooks walked up the street with Tomlinson and Hazel, he was in a position "where [he] could see [Hazel's right] hand at all times." (Tr. 8-9, 32-34). At the corner Hazel gave Brooks four gelatin capsules containing a white powder. Shortly thereafter, Brooks went home (Tr. 9). The next day about 10:45 p.m., he turned the capsules over to Officer Hankins at Texas Avenue and East Capital Street, S.E. (Tr. 10).

Ernest Tomlinson testified that on the evening of July 6, 1964, he was walking along with Brooks when they met Hazel (Tr. 43). Tomlinson knew Hazel and on one occasion in 1962 had a fight with him (Tr. 42, 48). Tomlinson observed Hazel engage in conversation with Brooks, walk away, and then return and converse with Brooks again (Tr. 43-44). As all three were walking along 14th Street, Tomlinson saw Brooks give Hazel "a

him refers to Daniels

quantity of money" (Tr. 45), and after a conversation with Brooks observed Hazel walk up to appellant—

> in an alcove like of a driveway by a—I mean by the store. (Tr. 44.)

Tomlinson and Brooks were standing together (Tr. 48-49, 60). Tomlinson saw "Hazel [give] Daniels a quantity of money and in return Daniels gave him something in his hand" (Tr. 45, 50), but Tomlinson could not perceive what appellant gave Hazel (Tr. 46, 50-51). Hazel returned to Brooks and all three walked north on 14th Street to U Street (Tr. 46). As to their respective walking positions, Tomlinson said:

> I can't say that we walked all the way up 14th Street at any set pattern with the three of us because it wasn't that way. We were talking going up the street. (Tr. 62)

At 14th and U Streets, Tomlinson observed Hazel transfer from his hand to Brooks "a quantity of gelatin capsules with white powder in them," but he did not know the exact number (Tr. 46, 62-63). Tomlinson admitted an unlawful entry conviction in 1964 (Tr. 56-57).

Officer Hankins testified that he received the four capsules from Brooks about 10:45 p.m. on July 7, 1964, and turned them over to the United States chemist, Mr. Steele, on July 9, 1964 (Tr. 65, 67). Mr. Steele testified that he received the four capsules from Hankins on July 9, 1964, and that a subsequent analysis revealed the capsules' contents to be an admixture of heroin hydrochloride, quinine hydrochloride, and mannitol (Tr. 73-74). Detective Somerville testified that he arrested appellant pursuant to an arrest warrant about 10:10 p.m. on September 11, 1964, in front of 1916 14th Street, N.W. (Tr. 68-69).

Appellant testified that he could not *then* recall what he had done on July 6, 1964. He denied selling narcotics to Hazel or Brooks on either July 6, 1964, or any other date. (Tr. 80-81). He indicated that he did not know of any reason why Brooks would procure a warrant

for his arrest (Tr. 87). He unequivocally stated that he did not know Brooks and that he saw him for the first time at the preliminary hearing (Tr. 78), but on cross-examination he said:

> A. I didn't know him *but I knew the individual that he was with.*
> Q. Do you know Ernest Tomlinson?
> A. Yes, I know him. (Tr. 87) (Emphasis added.)

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATUTES INVOLVED

Title 21, § 174, United States Code, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotics drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize convic-

tion unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Title 26, § 4704(a), United States Code, provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, § 4705(a), United States Code provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

I

During *voir dire*, the veniremen were asked whether any were connected with the Treasury Department. There was no response. Veniremen No. 215 was selected as Juror No. 3 and *is* employed by the Treasury Department.

Since appellant was given the master list of jurors *and* a list of veniremen sent to his courtroom, he could have discovered this juror's place of employment by the exercise of reasonable diligence during the selection of the jury and its two alternates. If not then, he certainly could have discovered this fact before the jury retired at three p.m.

Assuming, without conceding, that appellant did not discover it until the jury returned an adverse verdict, this juror's employment as a check numberer for the Treasury Department is *per se* not so inherently prejudicial as a matter of law to require this Court to grant a new trial.

II

A conscious delay by the police of two months and three days from the instant offense to the filing of the complaint was occasioned by society's interest in effective police work to detect violations of the narcotics laws. This reason has been held to be a commendably legitimate reason for such a delay.

Appellant asserts *pro forma* that he cannot recall the events of the day of the instant offense because of the two month and three day delay. This assertion is controverted, however, by his recollection of the events surrounding the offense, i.e., the informer's presence.

Since appellant has not carried the burden required by this Court, it follows that the District Court did not abuse its discretion in denying appellant's motion to dismiss the indictment.

ARGUMENT

I. The trial court did not abuse its discretion in denying appellant's motion for a new trial.

(E. 4, Tr. 103)

Appellant contends that a juror's failure to respond affirmatively to his *voir dire* question of whether or not any of the panel were employed by the Treasury Department was the concealment of a material fact violative of the Fifth and Sixth Amendments.

There are two short answers to this contention. (1) Before the *voir dire* oath was administered to the veniremen appellant's trial counsel was given by a deputy clerk of the District Court the typewritten list of veniremen sent to Judge Keech's courtroom on March 8, 1965, and

the mimeographed list of March 1965 jurors.[6] By comparing the number opposite the venireman's name on the typewritten list—here, 215—with the corresponding number on the mimeographed master list, appellant's trial counsel would have seen the following entry:

215 Mrs. Louise H. Mickens Govt 45 1320 Fairmont St. N.W. #201
Check numberer-Treas. Dept.

Even though venireman 215 did not respond to appellant's question (E. 4), the fact of her employment could have been discovered by reasonable diligence during the impanelling of the petit jury, or at the latest before 2:56 p.m. when the jury retired to began their deliberations (Tr. 103). Thus, "a disqualification which by reasonable diligence could have been discovered before verdict, may not afterwards be made the subject of an attack upon a verdict." *Spivey* v. *United States*, 109 F.2d 181, 185-186 (5th Cir. 1940), *cert. denied*, 310 U.S. 631 (1940). Assuming, *arguendo*, the exercise by counsel of reasonable diligence, appellant cannot raise the fact of the venireman's employment after an adverse verdict.

(2) Assuming, without conceding, that appellant's court-appointed trial counsel did not discover the juror's employment until after the adverse verdict,[7] the question on appeal is whether being a check numberer for the Treasury Department is "so obvious a disqualification or so inherently prejudicial as a matter of law . . . to require the court. . . to set the verdict aside and grant a new trial." *Frazier* v. *United States*, 335 U.S. 497, 513 (1948).

In *Frazier*, the Supreme Court said that employment of one juror as a Treasury messenger "was not so obvious a disqualification or so inherently prejudicial as a matter of law, in the absence of any challenge . . . before trial, as to require the court of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trial." *Ibid.* See *Cavness* v. *United States*, 187 F.2d

[6] This fact is inferable from appellant's Motion for a New Trial, paragraph 2.

[7] Appellant so claimed in his Motion for a New Trial.

719, 722-723 (9th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951). Therefore, appellee would submit that the employment of the instant juror as a check numberer in the Treasury Department is not inherently prejudicial.

II. The District Court properly denied appellant's motion to dismiss the indictment.

(E. 3, Tr. 80, 87-88)

Appellant must show (1) that there was no legitimate reason for the delay between the offense and the issuance of the arrest warrant, and (2) that he was prejudiced by the delay in order to invoke the supervisory power of this Court. *Powell* v. *United States*, No. 18315, decided August 30, 1965, slip opinion at 4; *Jackson* v. *United States*, No. 18597, decided September 13, 1965.

Here, the offense occurred on July 6, 1964 (Tr. 4, 43). The arrest warrant was issued on September 9, 1964,* and executed on September 11, 1964 (Tr. 69, 79).

Appellee submits that the reason for the two month and three day delay was the "substantial public interest in effective police work to detect violations of the narcotics law", *Ross* v. *United States*, No. 17877, decided June 30, 1965, slip opinion at 3, and that this reason is a legitimate reason for the conscious delay. *Powell* v. *United States*, *supra*, slip opinion at 5.

Appellant asserts that he was prejudiced by the two month and three day delay in that he cannot recall the events of July 6, 1964 (Tr. 80). This naked assertion is controverted, however, by appellant's testimony that he did not know Officer Brooks but he knew the police informer Brooks was with (Tr. 87).* Appellee would sub-

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* The arrest warrant is part of the record on appeal.

* Since the United States Commissioner's Record of Proceedings, also included in the record on appeal, reflects that only one witness —Officer Brooks—testified against appellant at the preliminary hearing, the logical and only inference to be drawn from appellant's response to the prosecutor's question is that appellant *remembered* that he knew the informer that Brooks was with on

mit that appellant is in the same shoes as the appellant who "took the stand and testified . . . about the circumstances surrounding the alleged offense." *Cannady* v. *United States*, No. 18392, decided July 14, 1965, slip opinion at 2.

Since appellant has not carried his burden as required by *Powell* and *Jackson*, appellee submits that the District Court properly denied his motion to dismiss the indictment.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
HENRY J. MONAHAN,
Assistant United States Attorneys.

July 6, 1964. This inference receives corroboration from his articulate analysis of Tomlinson's motive in testifying against him (Tr. 88), namely, that Tomlinson did not squeal because of their earlier fight but rather because he is a police informer.

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REPLY BRIEF FOR APPELLANT HENRY DANIELS, JR.

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19324

HENRY DANIELS, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

September 30, 1965

WILLIAM MALONE

701 Union Trust Building
Washington 5, D.C.

Attorney for Appellant
(Appointed by this Court)

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TABLE OF CITATIONS

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,324

HENRY DANIELS, JR., Appellant

v.

UNITED STATES OF AMERICA, Appellee

I. THE RECORD DOES NOT SUPPORT APPELLEE'S CONTENTION THAT APPELLANT'S COUNSEL HAD ADEQUATE OPPORTUNITY TO DISCOVER THE JUROR'S EMPLOYMENT

[With respect to point I, appellant desires the court to read the following pages of the Reporter's transcript: Supp. Tr. 2-4.]

Appellee argues in point I(1) of its brief that the fact of the juror's employment by the Treasury Department could have been discovered by reasonable diligence during the impanelling of the jury. There is no indication in the record as to when appellant's trial

counsel received the lists referred to by appellee. There is the clear implication from appellant's motion for new trial, filed March 11, 1965, which was uncontested on this point by the government's opposition, filed March 22, 1965, that appellant's counsel did not know of the juror's employment at the time of trial.

Even assuming, arguendo, that appellant's counsel had available the typewritten list of veniremen and the mimeographed list of March, 1965, there is no support for the conclusion that with reasonable diligence counsel could have discovered the juror's employment. An inspection of these two lists will show that considerable time is required to compare the list of veniremen with the mimeographed list of nearly three hundred names. The record further shows that prior to voir dire appellant's counsel was shunted from courtroom to chambers to motions court to bench conference. (Supp. Tr.2-4.) There is no indication that the time required to make this comparison was available.

Certainly, as to the question of connection with the Treasury Department, appellant's counsel was entitled to rely on the sworn testimony of the jurors.

Spivey v. U.S., 109 F.2d 181 (5th Cir. 1940), cert. den., 310 U.S. 631 (1940), cited by appellee, is readily distinguishable, since there is no suggestion in the court's opinion that defense counsel even inquired into the matter of previous convictions on voir dire examination.

II. APPELLEE'S REPLY TO APPELLANT'S SHOWING OF PREJUDICE IS BASED ON AN ERRONEOUS READING OF THE RECORD

[With respect to point II, appellant dedires the court to read the following pages of the Reporter's transcript: Tr. 78-88.]

The government's sole answer to appellant's showing of prejudice, viz., that because of his delayed arrest he was unable to recall what he did on the date of the alleged offense, is based on an ingenious but erroneous reading of the record. As was demonstrated in appellant's main brief at pages 14-16, the record clearly shows that appellant was unable to remember "a thing about July 6, 1964". This testimony remains uncontroverted on the record and unshaken by cross-examination of government counsel. The prejudice to appellant is clearly established thereby.

The government seeks to read appellant's testimony as an admission that appellant "did not know

Officer Brooks but . . . remembered that he knew the informer that Brooks was with on July 6, 1964." (Government brief, p. 9 at note 9.)

A reading of appellant's entire testimony on this point does not bear out the government's interpretation. The language in the transcript on which the government relies is as follows:

> Q As far as you know, then, there was no hard feelings between Officer Brooks and you becuase you didn't know him, is that right?
>
> A I didn't know him but I knew the individual that He was with.
>
> Q Do you know Ernest Tomlinson?
>
> A Yes, I know him. [Tr. 87.]

The appellant's first answer is capable of two interpretations. The first interpretation is that the individual Brooks was with at the hearing was Tomlinson. The mere fact that the Commissioner's record of proceedings does not recite that Tomlinson testified does not preclude the obvious interpretation impliedly recognized by appellee that Tomlinson was there*/ and that that is

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*/ It would not seem improbable that the prosecution did not offer Tomlinson as a witness, if Brooks' testimony was sufficient to commit appellant. Nowhere, did appellant testify that Tomlinson testified at the preliminary hearing.

the occasion being testified about. A possible second interpretation is that the "him" referred to is George Hazel, alias Billy King, the co-defendant, who is the subject of the preceding line of interrogation by prosecution counsel. (Tr. 83-86). Under this interpretation, prosecution counsel's question about Ernest Tomlinson marks the beginning of a parallel line of interrogation, and it would be incorrect to consider Tomlinson the antecedent of "the individual". This latter interpretation is not without difficulty, but it is not an unreasonable reading of the reporter's transcript. Appellant submits that either of these interpretations is more reasonable than appellee's.

On this record appellee cannot so easily dispose of appellant's substantial contention that he was denied due process by the government's purposeful delay. The fact that the jury was out over two-and-a-half hours (Tr. 103) strongly suggests that it did not consider the language relied on by appellee as an admission of presence during the alleged crime, which is the logical effect of the government's contention on this point. A clearer showing than the government has made here would be required to establish the claimed inconsistency

with appellant's clear and direct testimony of prejudice at pages 80 and 89-90.

Thus, the Powell and Jackson cases, relied upon by appellee, are distinguishable from the instant case on the absence of a showing of prejudicial effect. In Jackson v. U.S., No. 18,597, decided September 13, 1965, there was no attempt made to show that Jackson was prejudiced by the delay between the date of the alleged offense and the date of his arrest. But in holding that the required showing had not been made, the court defined a defendant's burden in these terms:

> "This is not to say that prejudice must be proved beyond a reasonable doubt, or even by a preponderance of the evidence. In Ross, we held it sufficient that the accused was able to establish only 'a plausible claim of inability to recall or reconstruct the events of the day of the offense.' Ross v. United States, supra, Note 1, slip opinion p. 11. The issue of prejudice being what it is, it will only be the rare case in which the accused can show much more than this. As we noted in Ross, 'In a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice.' Slip opinion p. 10. Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim."
> [Slip opinion, p. 4.]

Likewise, in Powell v. U.S., No. 18,315, decided August 30, 1965, the defendant did not take the stand, and hence there apparently was no evidence before the court as to whether or not Powell could remember his whereabouts on the dates of the alleged offense. Further, Powell's sister was able to testify as to his whereabouts during the period in question. It seems clear that the record in this case more than meets the criteria set forth above in the quotation from the Jackson opinion.

Finally, appellee cites Ross v. U.S., No. 17,877, decided June 30, 1965, for the proposition that the delay in this case was justified. The court in that case very carefully examined in section I of its opinion the facts surrounding the delay in Ross's arrest. The case does not stand for the general proposition that a two-month delay is always justified as being in the public interest. The government had ample opportunity to introduce evidence of any justification for its delay in appellant's case.*/ Its failure to do so should be taken as an admission that it had no such evidence to introduce.

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*/ Appellant's pre-trial motion for dismissal on the grounds of delay constituted ample notice to the government that the matter was in issue in this case.

CONCLUSION

Appellant submits that appellee's brief fails to meet squarely either of the issues relied upon by appellant in his main brief and that the arguments made therein should prevail.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

September 27, 1965

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Henry Daniels, Jr.,
Appellant

v.

United States of America,
Appellee

No. 19,324

PETITION FOR REHEARING EN BANC

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The appeal of your petitioner, Henry Daniels, Jr., presents an important issue which reaches the very fundamentals of the accused's Constitutional right to a fair trial by an impartial jury in the U.S. District Court for the District of Columbia. The jury issue was resolved against your petitioner by a divided panel of this Court. Because the panel's decision on the issue of full enjoyment of the right to an impartial jury defines more narrowly the rights of the accused in a criminal trial than the rights afforded parties in civil litigation under the majority rule, the panel's decision should be reviewed by the Court en banc. This case is of further importance because the procedure used in seating government employees on this jury did not in fact afford to the defendant the

protection which was made an implied condition of the Supreme Court's decision in the Wood case, in which the Court upheld the statute removing the common law disability of government employees to sit on criminal juries in the District of Columbia.[1/]

The Trial Below

Petitioner was convicted under the Federal narcotics statutes for an alleged third-party sale of narcotics. The prosecution offered two witnesses to the alleged sale -- an undercover policeman and an informer. Each was excluded from the courtroom during the testimony of the other, and their testimony was in conflict on such material matters as the locale of the alleged transaction and the chain of possession of the capsules alleged to have been sold by petitioner. A chemist employed by the Treasury Department testified as to his having acquired possession of certain capsules and as to their content. Petitioner took the stand to deny any knowledge of the alleged sale. After deliberating for over two-and-a-half hours, the jury returned a verdict of guilty.

Petitioner's appeal is founded on a prejudicial circumstance arising in the course of selection of the jury.

1/ U.S. v. Wood, 299 U.S. 123 (1936), upholding the Act of August 22, 1935, c. 605, 49 Stat. 682, now D. C. Code § 11-2302 (Supp. V).

The transcript of the examination of the jury on voir dire shows the following:

* * *

> Is there any reason why you can't decide this case fairly and impartially upon the evidence as it will be given by the prospective witnesses during the course of this trial?
>
> (No response.)
>
> Is there any reason that comes to your mind which would cause any of you to hesitate as the triers of the facts in a narcotics case?
>
> (No response.)
>
> I assume by your silence that the answers to these questions are in the negative?
>
> (No response.)
>
> * * *
>
> Are any of you or do you have close relatives who are connected with the Treasury Department or the Internal Revenue Service?
>
> (No response.)
>
> * * *
>
> [Slip opinion, pp. 2-3.]

There appears to be no dispute between counsel that juror number three, although she failed to respond to the fourth question set forth above, was in fact employed by the Treasury Department. The truth of her other responses on voir dire is not a matter of record.

In support of petitioner's motion below for a new trial, appointed counsel alleged -- and again it is not disputed -- that he was unaware of the juror's employment until after the trial was completed and that "the knowledge of such fact would probably have induced counsel to strike her from the jury." The trial court, after hearing oral argument, denied appellant's motion for a new trial based on the juror's failure to answer this question.

The Procedures Designed To Protect Petitioner's Right to An Impartial Jury Were Frustrated

The juror's failure to respond truthfully to at least one question deprived petitioner both of an opportunity to inquire into actual bias -- the basis of a challenge for cause -- and of an opportunity for the rational exercise of his peremptory challenges. Fed. R. Crim. Proc. 24.

The right of challenge is an integral part of trial by jury and "has always been held essential to the fairness of trial by jury." Lewis v. U.S., 146 U.S. 370, 376 (1892). Exercise of this right is based on a fair opportunity to examine the panel on voir dire. See Pointer v. U.S., 151 U.S. 396, 408-09 (1894). The purpose of the examination is to obtain information. But if false information is given by a juror under examination on oath, the examination prescribed by Rule 24 is rendered nugatory. Just as a defendant

cannot be tried without being afforded any voir dire examination, so likewise can he not be tried where he is deprived of the essential benefit of such examination by the wrongful act of another.

Had petitioner's counsel known of the juror's employment by the Treasury Department, he could have inquired as to her relationship to and attitude toward the Bureau of Narcotics, which is charged with enforcing the statutes under which petitioner was tried, and toward the prosecution's expert witness, who was a fellow employee of hers in the Department. The Supreme Court's caution as to government employees in general as jurors, that "the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him",[1/] applies with special force here, where such close ties with the prosecution exist. As the Court said more recently in the Dennis case, "Preservation of the opportunity to prove actual bias is the guarantee of a defendant's right to an impartial jury." Dennis v. U.S., 339 U.S. 162, 172

1/ U.S. v. Wood, 299 U.S. 123, 134 (1936) (emphasis supplied); and see id., at 149-150. Thus, the specific fact situation contemplated by the Court in the Wood case is presented by this appeal.

(1950).[1] Here, petitioner's counsel was deprived of the opportunity to inquire into her actual bias, for he was turned away at the threshold by the juror's wrongful failure to respond.

Likewise, petitioner was deprived by the juror's silence of the intelligent exercise of his peremptory challenges. Of the right to challenge peremptorily, the Supreme Court has said:

> "The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused . . .. [H]e cannot be compelled to make a peremptory challange until . . . an opportunity [has been] given for . . . examination of [each proposed juror] . . .."

Pointer v. U.S., supra. Where a juror conceals a material fact, that most important right of peremptory challenge is nullified. The Tenth Circuit in the recent case of Photostat Corp. v. Ball, 338 F.2d 783 (1964), recognized the prejudicial effect of such a nullification. There jurors in a negligence case improperly failed to respond when the panel was asked if any member had ever filed an auto claim. This failure was not intentional, and the information sought would not have compelled their exclusion from the jury. But the Court granted a new trial, quoting from its opinion in an earlier civil case:

1/ And see Morford v. U.S., 339 U.S. 258 (1950); Smith v. U.S., 262 F.2d 50 (4th Cir. 1958).

> ". . . '[w]hether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right.'"

Id., 338 F.2d at 787. The Photostat case is representative of the prevailing rule in civil cases.[1/] Surely the courts should not be more tender toward the impartiality of civil juries than of criminal juries.

In this case, where there was a conflict in evidence as to a third-party sale of narcotics, the petitioner was particularly in need of an impartial jury. He was entitled to a meaningful exercise of his rights under Rule 24. Here the very purpose of the examination on voir dire was frustrated by the juror's untruthful answer.

This Case Is Not Controlled By The Holding Of The Frazier Case

In denying petitioner's appeal the majority of the panel rests primarily on Frazier v. U.S., 335 U.S. 497 (1948).

1/ See, e.g., Shulinsky v. Boston & M. R.R., 83 N.H. 86, 139 A. 189 (1927); Marvins Credit, Inc. v. Steward, 133 A.2d 473 (Mun. Ct. App. D. C. 1957); Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 88 A.L.R. 917 (1933); Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194 (1947). Cf. Orenberg v. Thecker, 79 U.S. App. D.C. 149, 143 F.2d 375 (1944), where a far more complicated question was addressed to the jurors.

The defendant there was convicted under the Harrison Narcotics Act by a jury composed entirely of employees of the Federal government. One of the jurors and the wife of another were employees of the Treasury Department (but not of the Bureau of Narcotics). Defense counsel knew before trial of the two veniremen's connection with the Treasury Department, but he chose not to challenge them for cause.[1/] The Court refused to order a new trial, since the defense had not attempted to show actual bias at trial. The instant case, of course, is readily distinguishable, since defense counsel did not know at trial of the grounds for possible bias or for exercise of a peremptory challenge.[2/]

The majority of the panel in the instant case seem to hold that juror number three's employment by the Treasury Department could have been easily discovered by defense counsel before trial, relying on counsels' possession of the master list of March veniremen prior to trial. Having possession of the master list of 277 veniremen is not enough. Counsel must necessarily compare the names of the thirty veniremen assigned to the particular courtroom against the names and data as

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1/ His peremptory challenges had been exhausted against non-government employees, and the Court's opinion suggests that this was done deliberately.

2/ Defense counsel below exercised only one of his ten peremptory challenges.

shown on the master list.[1] This is a time-consuming process, because the names appear on the courtroom list out of numerical order. In any event there is no assurance that defense counsel had an opportunity to make the comparison, for he was sent off by the trial judge immediately before trial to the motions session to argue defendant's motion to dismiss. (Supp. Tr. 2-3; see also, dissenting opinion of Chief Judge Bazelon, slip op., p. 11.) In short, the pre-occupation of the majority of the panel with the question of defense counsel's diligence, on which the evidence of record -- if it shows anything -- shows that defense counsel was diligent, disregards the uncontroverted fact that it was only "after the trial was completed, [that] defendant's counsel discovered that a juror . . . [was] employed by the United States Department of the Treasury."[2] Thus, this case clearly falls outside the holding in the Frazier case, on which the majority of the panel relied.

1/ Copies of the two lists were certified to this Court by the Clerk of the District Court subsequent to the filing of petitioner's appeal brief.

2/ Defendant's motion for new trial, filed March 11, 1965, p. 2 (emphasis supplied).

Relief Prayed

WHEREFORE, petitioner prays that the Court will grant his petition and rehear his appeal en banc.

Respectfully submitted,

William Malone

701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

February 19, 1966.

CERTIFICATE OF COUNSEL

I hereby certify that in my opinion the foregoing Petition For Rehearing En Banc presents an important issue which should be considered by the Court and that the Petition is presented in good faith and not interposed for purposes of delay.

I further certify that I have caused a copy of the foregoing Petition to be served upon the U.S. attorney for the District of Columbia by leaving a copy at his office in the U.S. Courthouse, Washington, D. C., with the person in charge thereof.

William Malone

WILLIAM MALONE

February 21, 1966.